80-1488

No.

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ALEXANDER L. STEVAS,
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

NORMAN PARKS AND HAROLD STEELE,
Petitioners,

v.

LAMAR ALEXANDER, GOVERNOR, STATE OF TENNESSEE; WILLIAM M. LEECH, JR., ATTORNEY GENERAL, STATE OF TENNESSEE; GENTRY CROWELL, SECRETARY OF STATE, STATE OF TENNESSEE;
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF TENNESSEE

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QUESTIONS PRESENTED FOR REVIEW

1. Whether plaintiffs have standing as voters and taxpayers to challenge the legality of an amendment to the Tennessee State Constitution which was proposed and adopted in a manner that violated the State's legal and constitutional procedures for a limited constitutional convention, thereby depriving plaintiffs procedural and substantive due process guaranteed under the Fourteenth Amendment to the United States Constitution?

2. Whether plaintiffs' challenge to Article III Section 12 of the Tennessee State Constitution presents a justiciable controversy within the meaning of Article III Section 2 of the United States Constitution?

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF TENNESSEE

OPINIONS BELOW

The opinion of the Court of Appeals of Tennessee is reported at 608 S.W. 2d 881 and appears as Appendix A, hereto. The Opinion and Final Decree of the trial court, the Chancery Court of Davidson County, Tennessee of August 8, 1979, appears as Appendix B hereto. The Order of December 1, 1980, by the Tennessee Supreme Court denying plaintiffs' application for appeal by permission is attached as Appendix C hereto.

JURISDICTION

The judgment of the Court of Appeals of Tennessee became final on December 1, 1980. This Petition for Writ of Certiorari was filed within ninety (90) days of that date. This Court's jurisdiction is invoked under 28 U.S.C. 1257(3).

CONSTITUTIONAL PROVISIONS INVOKED

AMENDMENT XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within it jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

The Tennessee Court of Appeals has affirmed the decision of the trial court in dismissing plaintiffs' challenge of the validity of the Amendment to Article XI Section 12 of the Tennessee Constitution, which was ratified on March 7, 1978, on the grounds that they lacked standing to bring suit and that this claim was non-justiciable. The Tennessee Supreme Court has declined to review the decision of the Court of Appeals.

As alleged in the Amended Complaint, plaintiff Norman Parks is a citizen and resident of Rutherford County, Tennessee and plaintiff Harold Steele is a citizen and resident of Davidson County, Tennessee. As further alleged, both plaintiffs are taxpayers and were voters in the referendum calling the 1977 Limited Constitutional Convention.

Defendant Lamar Alexander is the duly elected Governor of the State of Tennessee; Defendant William Leech is the Attorney General for the State of Tennessee; and Defendant Gentry Crowell is the Secretary of State for the State of Tennessee.

Article XI, Section 3 of the Tennessee Constitution provides, in pertinent part:

> The Legislature shall have the right by law to submit to the people, at any general election, the question of calling a convention to alter, reform, or abolish this Constitution, or to alter, reform or abolish any specified part or parts of it; and when, upon such submission, a majority of all the voters voting upon the proposal submitted shall approve the proposal to call a convention, the delegates to such convention shall be chosen at the next general election, and the convention shall assemble for the consideration of such proposals as shall have received a favorable vote in said election, in such mode and manner as shall be prescribed. *No change in, or amendment to, this Constitution proposed by such convention shall become effective, unless within the limitations of the call of the convention,* and unless approved and ratified by a majority of the qualified voters voting separately on such change or amendment at an election to be held in such manner and on such date as may be fixed by the convention.

(Emphasis added).

On March 29, 1976 the Tennessee General Assembly adopted Chapter 848 of the Public Acts of 1976 proposing the calling of a Limited Constitutional Convention. That Act provided, in pertinent part:

> In order to ascertain the will of the people with respect to whether or not a limited constitutional convention should be called, there shall be submitted to the people of the State at the General Election to be held on August 5, 1976, the following question, which shall be printed in full on each ballot or voting machine, in words and figures as follows:
>
> CONSTITUTIONAL REFERENDUM
>
> Shall a convention be held to alter reform or abolish the following parts and subject matter of the present Constitu-

tion of Tennessee, the convention to be *limited* to consideration of and action upon the parts and subject matter included in this act and whose actions with respect thereto to become effective only after each amendment proposed by the convention is separately submitted to and ratified by a vote of the people.

* * *

Article XI, Section 12, relative to the segregation of white and negro school children;...

Article XI, Section 12 of the Tennessee State Constitution, prior to its amendment on March 7, 1978 read as follows:

Knowledge, learning, and virtue, being essential to the preservation of republican institutions, and the diffusion of the opportunities and advantages of education throughout the different portions of the State, being highly conducive to the promotion of this end, it shall be the duty of the General Assembly in all future periods of this Government to cherish literature and science. And the fund called common school fund, and all the lands and proceeds thereof, dividends, stocks, and other property of every description whatever, heretofore by law appropriated by the General Assembly of this State for the use of common schools, and all such as shall hereafter be appropriated, shall remain a perpetual fund, the principal of which shall never be diminished by Legislative appropriations; and the interest thereof shall be inviolably appropriated to the support and encouragement of common schools throughout the State, and for the equal benefit of all the people thereof; and *no law shall be made authorizing said fund or any part thereof to be divested to any other use than the support and encouragement of common schools.* The State taxes, derived hereafter from polls shall be appropriated to educational purposes, in such manner as the General Assembly shall from time to time

> direct by law. *No school established or aided under this section shall allow white and negro children to be received as scholars together in the same school.* The above provisions shall not prevent the Legislature from carrying into effect any laws that have been passed in favor of the Colleges, Universities or Academies, or from authorizing heirs or distributees to receive and enjoy escheated property under such laws as may be passed from time to time.

(Emphasis added).

On August 31, 1977, the Attorney General sent an opinion to the Honorable Richard J. Eskind, a delegate to the Limited Constitutional Convention, expressing the view that the convention was limited by its call to consideration of the segregation provision contained in Article XI, Section 12 and that said limitation was binding on the Convention.

The proposed Amendment to Article XI, Section 12 adopted by the constitutional convention, on October 11, 1977, states as follows:

PROPOSAL 5: CHANGES RELATIVE TO EDUCATION

> That Article XI of the Constitution of Tennessee *be amended by deleting therefrom in its entirety Section 12* and substituting therefor the following:
>
> > Section 12. Inherent value of education - Public schools - Support of higher education. The State of Tennessee recognizes the inherent value of education and encourages its support. The General Assembly shall provide for the maintenance, support and eligibility standards of a system of free public schools. The General Assembly may establish and support such post-secondary educational institutions, including public institutions of higher learning, as it determines.

(Emphasis added).

Thus, the proposed amendment to Article XI, Section 12 went far beyond the limited subject matter of the Convention Call by repealing the existing Article XI, Section 12 in its entirety, rather than dealing only with that portion of Section 12 that related to segregation.

Plaintiffs' Amended Complaint alleges that the amendment to Article XI, Section 12, is ineffective under the provisions of Article XI, Section 3, since the Amendment, on its face, clearly exceeds the express limitation stated in Chapter 848 of the Public Acts of 1976 calling the Limited Constitution Convention.

Article XI, Section 12, prior to the Amendment, constituted a limitation on the State's power to appropriate funds to support non-public schools. Since the repeal of this limitation, plaintiffs allege that the General Assembly has enacted legislation which would not have been constitutional prior to said repeal. Plaintiffs, as taxpayers, are therefore adversely affected by the illegal repeal of this limitation on the state's spending powers. As taxpayers, they will now be forced to contribute to the support of projects which otherwise could not be supported out of tax funds, and such additional projects constitute a drain from the tax proceeds of the state, and a further burden on plaintiffs, as taxpayers.[1]

---

[1]Paragraph 16 of the Amended Complaint states as follows:

> "16. Article XI, Section 12, prior to this amendment, constituted a limitation on the state's power to appropriate funds to support non public schools. Since the repeal of this limitation, the General Assembly has enacted legislation which would not have been constitutional prior to said repeal. Plaintiffs as taxpayers, are adversely affected by the illegal repeal of a limitation on the state's spending power. As taxpayers they will now be forced to contribute to the support of projects which otherwise could not be supported out of tax funds, and such additional projects constitute a drain from the tax proceeds of the State, and a further burden upon plaintiffs as taxpayers."

REASONS FOR GRANTING THE WRIT

I.

Plaintiffs' Standing To Challenge The Validity Of The Amendment To Article XI, Section 12 Of The Tennessee Constitution On The Grounds That Its Method Of Adoption Violated The Due Process Clause Of The Fourteenth Amendment Is A Federal Question.

A. As qualified voters in the referendum calling the Limited Constitution Convention that proposed the Amendment to Article XI, Section 12 of the Tennessee Constitution, plaintiffs have a direct and adequate interest in protecting the effectiveness of their votes.

Whether plaintiffs have standing to challenge the validity of an amendment to their state constitution on the ground that its manner of adoption violates the federal constitution is a question of federal law. *Ba er* v. *Carr,* 369 U.S. 186, 204 (1962). To have standing, the plaintiffs must allege such a personal stake in the outcome of the controversy as to assure the question to be adjudicated will be presented in an adversary context capable of judicial resolution. *Sierra Club* v. *Morton,* 405 U.S. 727, 731, 732 (1972); *Baker* v. *Carr, supra.*

Economic injury is not the only kind of injury that can support a plaintiff's constitutional standing to bring suit. *Vil. of Arlington Heights* v. *Metro Housing Corp.,* 429 U.S. 252, 262, 263 (1977).

The right to vote is recognized as a property right in Tennessee. *Joyner* v. *Browning,* 30 F. Supp. 512, 517 (E.D. Tenn. 1939).

In 1869, the Tennessee Supreme Court held in the case of *State* v. *Staten:*

> "The elective franchise is a right which the law protects and enforces as jealously as it does property in chattels or lands. . . (T)he person who, under the Constitution and laws of the State, is entitled to it, has property in it, which the law maintains and vindicates, as vigorously as it does any right of any kind which men may have and enjoy.
>
> The rules which guard against deprivation and injury to the rights of persons in corporeal properties, are alike and equally applicable to the elective franchise, and alike and equally guard persons invested with it, against deprivation of, or injury to it. Persons invested with it cannot be deprived of it, otherwise than by due process of law" 46 Tenn. 233 at 243.

The right to vote has also been declared to be a fundamental right guaranteed by the Fourteenth Amendment to the United States Constitution. *Smiley* v. *Holm,* 285 U.S. 355, 366 (1931); *Baker* v. *Carr, supra; Reynolds* v. *Sims,* 377 U.S. 533, 561, 562 (1964).

Where all citizens are affected in important ways by a governmental decision subject to an election or referendum, the Constitution does not permit arbitrary state action to abridge the rights of qualified voters. *Baker* v. *Carr, supra,* at 207; *Nixon* v. *Condon,* 286 U.S. 73 (1931); *Nixon* v. *Herndon,* 273 U.S. 536 (1926); *Phoenix* v. *Kolodziejski,* 399 U.S. 204, 209 (1970).

Constitutional provisions governing the exercise of political rights are subject to strict scrutiny. *Smiley* v. *Holm, supra,* at 369. In deciding the question of standing it is not relevant that the substantive issues in the litigation might not be justiciable. *Flast* v. *Cohen,* 392 U.S. 83 at 101 (1968).

The Court of Appeals erroneously rejected plaintiffs' claim to standing as qualified voters holding that they had no greater interest in the deliberations and proposals of the convention by virtue of their having voted in the referendum calling the con-

vention than they had as citizens of the State of Tennessee in general. 608 S.W. 2d 881, 891 (Tenn. App. 1980).

Plaintiffs have a special interest as voters in the referendum calling the Limited Constitutional Convention.

Plaintiffs allege that the action of the Limited Constitutional Convention in adopting the Amendment to Article XI, Section 12, violated plaintiff's constitutional rights to procedural and substantive due process under the Due Process Clause of the Fourteenth Amendment of the United States Constitution when it arbitrarily and capriciously disregarded the provisions of Article XI, Section 3 of the Tennessee Constitution and the limitations of the Convention Call set out in Chapter 848 of the Public Acts of 1976.

By acting in violation of the provisions of Article XI, Section 3 of the Tennessee Constitution, which defines the procedures for amending the constitution, the convention violated plaintiffs' special interest as "qualified voters" voting for the convention call. The language of Article XI, Section 3, dealing with constitutional amendments makes specific mention of "qualified voters" and thus creates an interest for such persons different from that of those members of the public who are not "qualified voters". Non-voters do not have the right to participate in the amendment process defined in Article XI, Section 3. The nature of the special interest which plaintiffs have as qualified voters participating in the referendum calling the Convention is that of beneficiaries of procedural and substantive due process safeguards, designed to protect the integrity of the amendatory process, who have a direct and adequate interest in protecting the effectiveness of their votes. *Coleman* v. *Miller,* 307 U.S. 433, 438 (1938).

This "special interest" as qualified voters is different from the interests of the public generally, which includes persons who are not qualified voters, and is thus sufficient to permit plaintiffs to prosecute this action.

The Article XI, Section 3 provision that amendments recommended to the people by constitutional conventions must be within the call of said conventions is a due process requirement. Plaintiffs have thus been deprived of substantive and procedural due process of law under the Fourteenth Amendment of the U. S. Constitution.

Plaintiffs' substantive due process right and cognizable property interest in the limitations of the convention call under Article XI, Section 3 of the Public Chapter 848 is established by virtue of their creation through constitutional and statutory enactment.

Plaintiffs have a legally cognizable interest in protecting the integrity of the constitutional process in that they have been injured in a way different from members of the public generally. As voters in the referendum creating the constitutional convention, they have been deprived of the vested right to have the constitutional convention act lawfully.

Plaintiffs, as voters participating in the decision of whether to create the constitutional convention, voted in the referendum on the basis of a reasonable belief that the convention to be created thereby would be required to abide by Article XI, Section 3 and the Public Chapter 848 limitations upon its powers. The convention created by plaintiffs and other voters in said referendum ignored said limitations. The voters who participated in said election were led to believe that the convention they were calling would be limited, and now two of those voters seek to redress the injury to them and to their franchise.

Voters who allege facts showing disadvantage to themselves as individuals have standing to sue. *Baker* v. *Carr, supra,* at 206; *Coleman* v. *Miller, supra.*

Thus, the State Courts erred in denying plaintiffs standing to sue based upon an alleged illegal action adversely affecting their rights as qualified voters, rights guaranteed under the Fourteenth Amendment.

B. As taxpayers, plaintiffs have a special interest in preventing an unconstitutional increase in their tax burden.

Plaintiffs also claim standing to sue alleging a special interest as taxpayers.

It is well established that citizens have standing as taxpayers to maintain actions provided that the challenged action in some way affects the tax burden and there is a logical nixus between taxpayer status and the legislative enactment being attacked. *Flast* v. *Cohen, supra* at 102.

Paragraph 16 of the Amended Complaint alleges that Article XI, Section 12 of the Tennessee Constitution, prior to its recent amendment, contained a limit on the State's spending power by virtue of the provision requiring that the common school fund (i.e., stated education appropriations) could be used only for the support of common (i.e., public) schools. Thus, the Amended Complaint alleges that Article XI, Section 12, prior to its amendment, prohibited the use of tax money for the support of private education. The Amended Complaint further alleges that an expenditure in support of private education has been made by the General Assembly since the Amendment to Article XI, Section 12 that would have been unconstitutional prior to the amendment. For the purposes of a motion to dismiss, allegations of the Complaint must be treated as true. *Warth* v. *Seldin*, 422 U.S. 490, 501 (1975).

Such expenditures constitute a drain from the tax proceeds of the state and place a further burden on plaintiffs as taxpayers. This alleged burden gives plaintiffs as taxpayers a special interest in maintaining those particular provisions of Article XI, Section 12 relating to the common school fund that is different from that of those citizens who are not taxpayers.

II.

Plaintiff's Challenge To The Legality Of The Amendment To Article XI, Section 12 Of The Tennessee Constitution Presents A Justiciable Controversy Within The Meaning Of Article III, Section 2 Of The Federal Constitution.

A. Plaintiffs have had the effect of their votes calling for the Limited Constitutional Convention abridged by the illegal action of the Convention in proposing the Amendment to Article XI, Section 12 of the Tennessee Constitution Which Exceeded the limits of the convention call.

The State Courts erred in holding plaintiffs' claim to be nonjusticiable on the grounds that it is theoretical and contingent upon future enactment of legislation implementing the amendment to Article XI, Section 12. 608 S.W.2d at 892.

It is clearly stated in plaintiffs' amended complaint that the denial of substantive and procedural due process has already occurred; first, by virtue of the illegal action of the Limited Constitutional Convention itself, and second, by the fact that legislation, which would have violated the provisions of Article XI, Section 12 prior to its amendment, has already been enacted. However, the Court apparently chose to ignore the rule of procedure that when ruling on a motion to dismiss, the facts alleged in the complaint must be construed in a light most favorable to the plaintiff and must be accepted as true. *Warth* v. *Seldin, supra.*

Plaintiffs have a "legally protectable interest" in the procedures governing the amendment of the Tennessee State Constitution by Constitutional Convention.

Plaintiffs have a "legally protectable interest" in the procedures governing the Constitutional Convention which adopted the Amendment to Article XI, Section 12. Their main grievance is with respect to what has already happened, the proposal and passage of an amendment to the State Constitution

that was beyond the Call of the Constitutional Convention. This adverse effect has already occurred.

To understand fully, it is necessary to review some of the history of the Constitutional Amendment process involved.

Article XI, Section 3, as it now exists, was adopted by a Constitutional Convention and approved by the voters in 1953 and defines the ways in which the Constitution may be amended. It provides in relevant part as follows:

> . . .No change in, or amendment to, this Constitution proposed by such convention shall become effective, unless within the limitations of the call of the convention, and unless approved and ratified by a majority of the qualified voters voting separately on such change or amendment at an election to be held in such manner and on such date as may be fixed by the convention.. . .

Article XI, Section 3 was construed by the Tennessee Supreme Court in 1975 in the case of *Snow* v. *City of Memphis,* 527 S.W. 2d 55 (1975). The court held that when the Constitutional Convention method is used in amending the State Constitution, the Legislature initiating that method by proposing a limited call cannot impose limitations on a convention beyond a designation of the part or parts of the Constitution to be altered, reformed or abolished and the subjects to be considered, but that the limitations in the call, to the extent they specify a part or parts of the Constitution or designate subject matter, are *binding* on the Convention. at 71.

On March 19, 1976, Chapter 848 of the Public Acts of 1976 was enacted into Law which was to submit to the people of Tennessee the question of calling a convention for the purpose of altering, reforming, or abolishing the present Constitution of Tennessee with respect to certain parts and subject matter.

Section 1 of the Act provides in pertinent part:

> . . .the convention to be limited to consideration of and action upon the parts and subject matter included in this act and whose actions with respect thereto to become effective only after each amendment proposed by the convention is separately submitted to and ratified by a vote of the people.
>
> * * * *
>
> Article XI, Section 12, relative to the segregation of white and negro school children;. . .

The Constitutional Convention, after securing a legal opinion from the Attorney General stating that only the specific provision of Article XI, Section 12 relative to the segregation of white and negro school children could be considered in amending the Article of the Constitution, arbitrarily and capriciously disregarded this opinion and clear language of the Call and Article XI, Section 3, and adopted an Amendment which exceeded the limitation of the convention call by rewriting Section 12 in its entirety.

It is plaintiffs' contention that, as voters who voted in the referendum calling for the limited constitutional convention, they have a legally protectable interest analogous to a property right in constitutional and statutory provisions that set specific paramaters on the conduct of the convention. Because voters have both procedural and substantive due process rights in the amendatory process in which they participate, they have a legally cognizable interest in protecting the integrity of that process.

Plaintiffs' interest arises from the recognized right of voters to redress injuries to the franchise. *State* v. *Staten, Supra.*

Voters who create a convention have a protectable right to require it to abide by the constitutional and statutory rules under which it was called. When those rules are violated, an injury has been done to the franchise. The injury is in the nature of a con-

structive fraud since the voters' reasonable expectations that the convention will operate within the Call which they are approving has been defeated.

In the case of *West* v. *Carr,* 212 Tenn. 367, 380, 370 S.W.2d 469, 474 (1963), the Tennessee Supreme Court makes it clear that when a constitutional convention proposes, and the people of the State ratify, an amendment which is shown to be illegal, it would be the duty of the courts to declare such amendment "void to the extent of the conflict."

Yet the State in this action has thus far prevented such a void amendment from reaching the courts on the merits of the issue of its legality.

B. Plaintiffs have incurred an unconstitutional increase in their tax burden as a result of the illegal Amendment to Article XI, Section 12 of the Tennessee Constitution, ratified on March 7, 1978.

Plaintiffs have a legally protectable interest in preventing unconstitutional increases in their tax burden.

The Amended Complaint alleges that since the ratification of the Amendment of Article XI, Section 12 on March 7, 1978, the Legislature has enacted laws which provide support for private institutions of higher education.

It is plaintiffs' contention that such legislation would have been impermissible under the language of the original Article which provided that the common school fund is "for the support and encouragement of common [public] schools."

By making such tax expenditures constitutional, the Amendment of Article XI, Section 12, deprives plaintiffs of a previously existing means by which they could have challenged their legality and prevented them from occurring. As a result of the convention's having acted to adopt the Amendment and the voters' ratification thereof, plaintiffs are adversely affected as required by *West* v. *Carr, supra.*

Thus, plaintiffs have been denied procedural and substantive due process guaranteed under the Fourteenth Amendment to the U.S. Constitution. Such interests are clearly protectable and do not constitute a political question, *Baker* v. *Carr, supra* at 209, nor will they require a Court to render an advisory opinion or a hypothecated decision. *Bowen* v. *U.S.*, 422 U.S. 916, 921 (1975).

Plaintiffs' claim is a case and controversy within the meaning of Article III, Section 2 of the United States Constitution and therefore justiciable.

CONCLUSION

Wherefore, by virtue of the foregoing, plaintiffs respectfully submit that their Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

DAVIDSON EQUITY

Norman Parks and Harold Steele, Individually and on behalf of Nashville Chapter of Americans United for Separation of Church and State

Plaintiffs-Appellants

v.

Lamar Alexander, Governor
State of Tennessee;
William M. Leech, Jr., Attorney General
State of Tennessee; and
Gentry Crowell, Secretary of State,
State of Tennessee

Defendants-Appellees

COURT OF APPEALS OF TENNESSEE
MIDDLE SECTION AT NASHVILLE

Appealed From The Seventh Chancery Division, Part III, For Davidson County, Tennessee

The Honorable Robert S. Brandt, Chancellor

Filed: August 29, 1980

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AFFIRMED AND REMANDED
Samuel L. Lewis
Judge

OPINION

Plaintiffs filed their petition for declaratory judgment in the Chancery Court for Davidson County, Tennessee, and asked for a declaration that the amendment ratified by the voters in a statewide referendum on March 7, 1978, to Article XI, Section 12, of the Tennessee Constitution is null and void because the amendment violates Article XI, Section 3, of the Tennessee Constitution by exceeding the limitations of the convention call. Thereafter, defendants moved to dismiss the complaint on the grounds that plaintiffs lacked standing to maintain the action and that the complaint failed to present a justiciable controversy as required to present a case under the Declaratory Judgments Act, T.C.A. §§ 23-1101 to 1113. An agreed order striking plaintiffs' original complaint and granting leave to file an amended complaint was entered.

On May 18, 1979, plaintiffs filed an amended complaint asking for a declaration that the amendment, ratified by the voters

on March 7, 1978, to Article XI, Section 12,[1] of the Tennessee Constitution is null and void because it violates Article XI, Section 3,[2] of the Tennessee Constitution since it exceeds the limitations of the convention call as set out in Tennessee Public Acts, 1976, ch. 848. The amended complaint alleged that plaintiffs are citizens of the State of Tennessee, taxpayers of the State of Tennessee, and were voters in the referendum calling the 1977 limited constitutional convention. The complaint further alleged that Chapter 848 of the Public Acts of 1976 calling for the limited constitutional convention provided that the convention was to be limited to consideration of and action upon specified parts of the Constitution including only that part of Article XI, Section 12, relative to the segregation of white and Negro school children; that the amendment proposed by the limited constitutional convention to Article XI, Section 12, went beyond the limited subject matter of the convention call by repealing the existing Article XI, Section 12, in its entirety and substituting in lieu thereof an entirely new Article XI, Section 12; that the amendment to Article XI, Section 12, is void because it exceeds the express limitations stated in Chapter 848 of the Public Acts of 1976 and is ineffective according to the terms of Article XI, Section 3, of the Tennessee Constitution.

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[1] Tenn. Const. art. XI, § 12, now provides:

Education's inherent value—Public schools—Support of higher education.—The State of Tennessee recognizes the inherent value of education and encourages its support. The General Assembly shall provide for the maintenance, support and eligibility standards of a system of free public schools. The General Assembly may establish and support such postsecondary educational institutions, including public institutions of higher learning, as it determines.

[2] Tenn. Const. art. XI, § 3, provides in pertinent part:

The Legislature shall have the right by law to submit to the people, at any general election, the question of calling a convention to alter, reform, or abolish this Constitution, or to alter, reform or abolish any specified part or parts of it; and when, upon such submission, a majority of all the voters voting upon the proposal submitted shall ap-

Plaintiffs alleged that they had been deprived of substantive and procedural due process of law under the 14th Amendment to the United States Constitution[3] and Article I, Section 8, of the Tennessee Constitution,[4] that their due process right is a cognizable property interest, and that they have a legally cognizable interest in protecting the integrity of the convention process because as voters in the referendum creating the limited constitutional convention they were deprived of the vested right to have the constitutional convention act lawfully and in accordance with the call. Plaintiffs alleged that this injury to them as voters in the referendum calling the convention is an injury different from that suffered by members of the public generally.

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prove the proposal to call a convention, the delegates to such convention shall be chosen at the next general election and the convention shall assemble for the consideration of such proposals as shall have received a favorable vote in said election, in such mode and manner as shall be prescribed. No change in, or amendment to, this Constitution proposed by such convention shall become effective, unless within the limitations of the call of the convention, and unless approved and ratified by a majority of the qualified voters voting separately on such change or amendment at an election to be held in such manner and on such date as may be fixed by the convention.

[3] U. S. Const. amend. XIV, § 1, provides:

Citizenship—Due process of law—Equal protection. — All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

[4] Tenn. Const. art. I, § 8, provides:

No man to be disturbed but by law. — That no man shall be taken or imprisoned, or disseized of his freehold, liberties or privileges, or outlawed, or exiled, or in any manner destroyed or deprived of his life, liberty or property, but by the judgment of his peers or the law of the land.

Further, plaintiffs alleged that Article XI, Section 12, prior to the amendment, constituted a limitation on the State's power to appropriate funds to support nonpublic schools; that since the repeal of the limitation, the General Assembly has enacted legislation which would not have been constitutional prior to the said repeal; that, as taxpayers, they are adversely affected by the illegal repeal of the limitation of the State's spending powers; that, as taxpayers, plaintiffs will now be forced to contribute to the support of projects which otherwise could not have been supported out of tax funds; and that these contributions constitute a further burden on plaintiffs as taxpayers.

On motion of the defendants, the Chancellor dismissed the amended complaint on the grounds that plaintiffs lacked standing to bring the suit and that the suit did not present a justiciable controversy as required for declaratory relief under T.C.A. §§ 23-1101 to 1113. Plaintiffs have appealed and present two issues: 1) Whether plaintiffs have standing either as voters or as taxpayers to challenge the legality of the amendment to Article XI, Section 12, of the Tennessee Constitution ratified on March 7, 1978, and 2) Whether plaintiffs' challenge to the legality of the amendment to Article XI, Section 12, of the Tennessee Constitution ratified on March 7, 1978, presents a justiciable controversy.

In support of their first issue plaintiffs allege that the action of the limited constitutional convention in adopting the amendment to Article XI, Section 12, violated their constitutional rights to procedural and substantive due process under the due process clause of the 14th Amendment to the United States Constitution and Article I, Section 8, of the Tennessee Constitution when it arbitrarily and capriciously disregarded the provisions of Article XI, Section 3, of the Tennessee Constitution and the limitations of the convention call as set out in Tennessee Public Acts, 1976, ch. 848. Their contention is that the limited convention, by violating the provisions of Article XI, Section 3, of the Tennessee Constitution which defines the pro-

cedure for amending the Constitution, thereby violated their special interest as "qualified voters" who voted for the convention call and are entitled to have the convention act lawfully. They allege that this special interest as qualified voters is different from the interests of the public generally which includes persons who are not qualified voters and is thus sufficient to permit them to prosecute this action. They also allege that the convention ignored the limitations of the call and thus engaged in a constructive fraud upon the voters who participated in the election calling the convention.

It is universally held that to question the validity of a law, the person questioning the validity of that law must have an interest.

> It is always open to interested persons to show that the legislature has transgressed the limits of its power, and persons injuriously affected may question the validity of a law. But the requirements of interest and injury are important ones. A constitutional question does not arise merely because it is raised and a decision thereof sought. Even though a statute is unconstitutional, only those who have a right to raise a question of its unconstitutionality may invoke the aid of the courts to have it judicially set aside, and the constitutionality of a legislative act is open to attack only by those persons whose rights are affected thereby. Before a law can be assailed by any person on the ground that it is unconstitutional, he must show that he has an interest in the question in that the enforcement of the law would be an infringement on his rights. Assailants must therefore show the applicability of the statute to them and that they are thereby injuriously affected . . . .
>
> . . . Absent a showing of injury, actual or threatened, there can be no constitutional argument. 16 Am. Jur. 2d **Constitutional Law** § 188 (1979) (footnotes omitted).

The mere status of a taxpayer or voter is not sufficient to bring an action in and of itself:

> Before a law can be assailed by any person on the ground that it is unconstitutional, he must show that he has an interest in the question in that the enforcement of the law would be an infringement on his rights. He must show that he personally has sustained, or is in immediate danger of sustaining, some direct injury as the result of such enforcement, and not merely that he suffers in some indefinate way in common with people generally. 59 Am. Jur. 2d **Parties** § 26 (1971) (footnote omitted).

The generally acknowledged purpose of this requirement of special damage or private harm to the individual rests in the public policy of protecting public corporations from a profusion of suits. See 42 Am. Jur. 2d **Injunctions** § 179 (1969).

Patton v. *Chattanooga,* 108 Tenn. 197, 65 S.W. 414 (1901), has been cited as the leading case on the modern doctrine of taxpayers' standing in Tennessee. *See Wamp* v. *Chattanooga Housing Authority,* 527 F.2d 595 (6th Cir. 1975), *cert. denied,* 425 U. S. 992 (1976). In *Patton,* nineteen citizens of Chattanooga, on behalf of all taxpayers, brought suit to have an ordinance declared void. The ordinance granted certain persons the right to establish and to maintain an electrical plant and a telephone, telegraph, and electrical exchange in the City. The Court of Chancery Appeals affirmed the Chancellor's holding that the ordinance was void. The Supreme Court reversed:

> There is no question as to the jurisdiction of the Chancery Court to restrain municipal ordinances upon the ground that they are beyond the powers conferred upon the municipality, or that they were not passed regularly or according to the forms of law.
>
> There is no question that any one who suffers, or will suffer, a special injury, may maintain a suit to test the

validity of an ordinance upon either of these grounds, and that such a bill may be maintained by a taxpayer, as such, if the result of the ordinance will be to increase his tax burden.

What we decide is, that it is essential to the jurisdiction of the Court, in such a case, that there shall be an allegation that the effect of the ordinance, claimed to be illegal, will be to require of complainant the payment of a tax, to increase his tax burdens, or otherwise inflict an injury not common to the body of the citizens. 108 Tenn. at 221, 65 S.W. at 420.

The Court continued:

In all such matters—matters which affect not the private rights of certain citizens, but only those public rights which are common to all and incident to citizenship itself, the law confers upon the duly elected representatives of the people the sole right to appeal to the courts for redress. It is only when he can go further, and show some right which he has aside from those rights which are incident to the mere fact of citizenship, that he may, for himself, or in behalf of others similarly situated, invoke the conceded jurisdiction of the courts to restrain an ordinance passed irregularly or without authority. Matters of common interest, both of original action and of redress, are entrusted to duly chosen public officials, and, in such matters, the Chancery Court is not open to confer upon private citizens the right of public guardianship. *Id.* at 222, 65 S.W. at 420.

Further:

It is a well settled rule that equity will not interfere by its injunctive process in a case like this, unless the complainants show that they will suffer some special injury, and not merely an injury in common with the body of the citizens. This rule is, we believe, without exception. There

> is a line of Tennessee cases in which taxpayers, as such, may maintain an injunction against public officials. But these are cases involving public revenues, and in which the result of the proposed action will be to increase the burden of taxation. It being proposed to increase the burden of taxation upon each individual taxpayer, he will sustain an injury not common to those citizens who are not taxpayers, and hence, as a taxpayer, on behalf of himself and other taxpayers, he has a status in court to contest the legality of the accomplished or proposed action. [citing *Lynn* v. *Polk, Kennedy* v. *Montgomery County,* and *Colburn* v. *Chattanooga Western Railroad, infra.*]
>
> But these cases are strictly in line with the rule that complainants must be threatened with an injury not common to the body of the citizens. *Id.* at 223-24, 65 S.W. at 421.

The Court asserted that one must suffer a special injury to test the validity of an ordinance on the grounds that it is beyond powers conferred upon the municipality or that it was not passed according to the forms of law and that the relationship increases his tax burden. *Id.* at 221, 65 S.W. at 420. The line of cases to which the above quote refers merely clarifies the "special injury" concept not shared with the body of citizens and will be discussed below. The *Patton* distinctions concern when the complainant must, as a matter of form, allege special injury in the complaint. *Patton* requires that when the ultra vires actions of municipal officers are challenged, an allegation of increased taxes or other special injury is essential to the court's jurisdiction. *Id.*

In resolving the standing issue in *Patton* in regards to the ordinance, the Court stated: "[I]t is clear that complainants have no status in Court. What injury can this ordinance possibly do to them which is not common to all citizens?" *Id.* at 227, 65 S.W. at 421-22.

In *Lynn* v. *Polk,* 76 Tenn. 121 (1881), the challenged act was one " 'to settle and compromise the bonded indebtedness of the State.' " *Id.* at 122. In form, outstanding bonds were to be redeemed and exchanged for "compromise bonds." The coupons would then be received in payment for taxes and debts due the state. On the hearing to dissolve an injunction, the Chancellor dismissed the bill. In referring to the status of complainants, the Court said:

> As we have seen, they are citizens and tax-payers of the State. It must be that, to the extent of taxes for which they are respectively liable, each has an interest in the questions raised. The act of the Legislature and the defense to the bill constitute an effort in the direction to make each pay such an amount of money as may be assessed upon his property, to the end that the law shall be carried out. . . . If the law is valid, it makes an increase of taxes to be collected of each tax-payer, to be proportioned in the distribution of the additional levy of the annual three per cent. interest on the funded debt. The act, while in its present shape, is merely a proposal to contract. If the injunction is cut loose, and the creditors accept its terms and fund their debts, it is then an executed contract, and gives to the creditor the right and power to collect by law three per cent. of taxes annually, more than can now be collected by law. *Id.* at 123-24.

In this increased tax burden resulting from wrongful legislative action rests the special or private harm which separates these taxpayers from all the citizens in the state.

In deciding that the taxpayers had standing, the Court stated:

> The only question for us to decide, upon the right to sue, is, have complainants an interest in the subject-matter of the suit such as will entitle them to invoke the judgment of the court upon legal questions? . . . Then, as these complainant tax-payers could not by the law at the time of the

> contract, and which is part of that contract, be compelled to pay anything, not that it is attempted to change the contract and the law, so as to compel the payment of three per cent. yearly . . . , it must be that they have a direct and personal interest in the questions, and are proper parties to make them. *Id.* at 124-25.

In *Colburn* v. *Chattanooga Western Railroad,* 94 Tenn. 43, 28 S.W. 298 (1894), two taxpayers of Hamilton County sought an injunction to stop delivery of county bonds to a railroad. The bonds were issued to secure the building of a bridge across the Tennessee River. The cost of the bridge would have exceeded the amount which could be realized from special taxation, thus necessitating the bond issue. The defendants' demurrer was overruled and a perpetual injunction granted. Although the Court did not discuss the standing issue per se, that the unconstitutional augmentation of the county indebtedness bore a direct correlation to the tax liability of Hamilton County taxpayers who would then "sustain an injury not common to those citizens who are not taxpayers" is evident. *Patton* v. *Chattanooga,* 108 Tenn. at 223, 65 S.W. at 421.

Kennedy v. *Montgomery County,* 98 Tenn. 165, 38 S.W. 1075 (1897), is a consolidation of two taxpayer suits. In the first, an injunction was sought to enjoin collection of a special tax assessed for railroad purposes because money was on hand to discharge the railroad indebtedness. The injunction was granted and then dissolved on answer, and a demurrer to the injunction bill sustained. In the second suit a petition to supersede a levy made to collect such tax from plaintiff taxpayer was dismissed.

The county had subscribed $250,000 to a railroad. The legislature passed an act providing for the issuing of bonds with any dividends from the stock to be applied to the interest on the bonds, thereby creating a sinking fund to retire them. If the dividends were not sufficient, the county court was directed to levy a railroad tax. Plaintiffs alleged that the county judge

misapplied the revenues to other county debts, and he was enjoined from doing so in a separate suit. When the bonds matured, the sum of $134,000 remained outstanding. By legislative act, these bonds were refunded into new bonds. The bill charged that the taxpayers, under the 1893 levy, had more than enough money to discharge the outstanding bonds; yet, despite that fact, the county court levied a railroad tax in 1894.

The Court stated:

> When the people consent to be taxed for any purpose they cannot complain, but when they are taxed for one purpose and the fund applied to another, and when they are misled as to the purposes for which they are being taxed, they have a right not only to complain, but a remedy to redress the grievance, if they apply to the Courts in the proper way and at the proper time. *Id.* at 180, 38 S.W. at 1079.

The common denominator in the latter three cases is the violation of a constitutional mandate limiting the amount or form of tax liability. In all the cases, the acts complained of were in violation of an existing law, the validity of which was not contested.

In *Patton,* Chief Justice Snodgrass explained the purpose for establishing technical rules of standing when a government action is challenged:

> They lie at the very foundation of the orderly conduct of municipal government. If cities could not exercise public powers, even erroneously or unwisely, when lawfully done by their constituted legislative authority, without the concurrence of every citizen or taxpayer, it would be impossible to have municipal goverment, and there never could be any certainty or permanence in municipal grants of franchises for public purposes. And if, when granted, they are open to other contest than that and by those indicated, no public work could ever be accomplished, and intolerable

> confusion and complication would prevail in every city of sufficient importance to have competing or conflicting interests in public grants, or discontented citizens to litigate all public acts not affecting their private interests. Besides, it would delay many and destroy more useful public enterprises requiring municipal authority. *Id.* at 231, 65 S.W. at 422-23.

In *Pope* v. *Dykes,* 116 Tenn. 230, 93 S.W. 85 (1905), citizens and taxpayers of Marion County sued the road commission and sought to enjoin it from working on certain roads alleged to be either not set out in the act authorizing a bond issue or not one of the roads to be completed first. The defendants answered the bill and obtained leave to amend their demurrer " '[b]ecause said complainants and none of them had or had shown any peculiar or particular injury suffered or sustained which entitles them or either of them to maintain this bill.' " *Id.* at 238, 93 S.W. at 87. The demurrer was sustained. In addressing the standing issue, the Court stated:

> The first question to be settled is in respect of the rights of complainants to maintain this bill. The precise ground upon which complainants rely is thus stated by their learned counsel: "Our contention is that this is a suit on behalf of taxpayers to prevent a mal-administration of public funds, derived from sales of public bonds, the principal and interest of which will have to be paid by the taxpayers of the county, thereby necessarily increasing the burden of taxation, in which the taxpayers have such a special interest as entitles them to a status in court. . . . It has always been understood as axiomatic that a taxpayer, for himself and other taxpayers, might maintain an action to prevent the commission of an unlawful act, the effect of which would be to increase his burden of taxation, or to divert a public fund from the purpose for which it was intended by law. In cases like this, the taxpayers have such a special interest in the subject-matter as will authorize them to main-

> tain an injunction." Counsel cites [several cases] in support of his proposition . . . . But it is said the rule announced in the cases . . . has been changed by the recent ruling of this court in *Patton* v. *Chattanooga,* [*supra*]. *Id.* at 239-40, 93 S.W. at 87 (some citations omitted).

In distinguishing *Patton,* the Court continued:

> In *Patton* v. *Chattanooga* . . . . [i]t was held by this court that the ordinance in question was not of a nature that inflicts or imposes upon the complainant citizens any loss, burden, injury, or deprivation of rights that is not common to the entire body of citizens and taxpayers. It was further held that it is essential in the bill brought by citizens and taxpayers to enjoin a city ordinance on account of its alleged invalidity that complainants aver that they are or will be subjected by such ordinance to some loss, burden, injury, or deprivation of rights peculiar to themselves and not imposed alike and in common upon the entire community. Matters of common interest affecting alike all members of the community are within the exclusive jurisdiction of said authorities
>
> . . . .
>
> But the case made in the present bill is altogether different. It is alleged herein that defendants are acting outside of the authority conferred upon them by the act of 1903, in that they are diverting public funds to the building of a road not authorized by the act, which will result in irreparable injury to the county and taxpayers. The effect of the misappropriation of these funds would of course be the imposition of additional tax burdens upon the complainants. We are therefore of opinion that complainants are entitled to maintain this bill to the extent that it seeks to enjoin the building of the mountain road which is not authorized by the act of 1903. *Id.* at 240-42, 93 S.W. at 88 (citation omitted).

Thus *Pope,* in accord with *Kennedy* and *Patton,* recognizes the special or private injury to taxpayers when an official is diverting public funds from their designated and authorized use.

In *Reams* v. *Board of Mayor and Aldermen of McMinnville,* 155 Tenn. 222, 291 S.W. 1067 (1927), a taxpayer sought to enjoin the Mayor and Board from locating a school outside the corporate limits of the town. The Chancellor overruled the demurrer challenging plaintiff's right to bring a taxpayer's suit. In accordance with the general rule, *Reams* asserts that taxpayers may sue to enjoin official action which violates their legal obligations if the conduct would impose a burden upon taxpayers which would not be imposed upon nontaxpayers. *Reams,* therefore, requires for taxpayers' standing that the officer must be acting illegally, in the sense of no color of right; that such act must impose additional taxation or result in the additional expenditure of municipal funds; and that there must be injury to the taxpayer to the exclusion of the nontaxpayer. *Id.* at 225-26, 291 S.W. at 1068.

In *Badgett* v. *Rogers,* 222 Tenn. 374, 436 S.W.2d 292 (1968), the court summarized standing rights to date. In *Badgett* a taxpayer brought suit for recovery of a sum paid the mayor in connection with an expense account and for injunctive relief. The Chancellor dismissed the suit. On appeal, the Court framed the crucial issue as follows: "Does an individual citizen and taxpayer of a municipality have standing to seek relief against municipal officials for alleged misappropriation of misuse of tax funds?" *Id.* at 378, 436 S.W.2d at 293.

The Court discussed the competing considerations to be balanced in resolving the standing issue:

> On the one hand, it is undeniably the right of a taxpayer to know that his taxes are expended properly and are not unlawfully diverted or misused. On the other hand, the courts have long recognized the necessity of allowing municipal officials to perform their duties without in-

> terference from frequent and possibly frivolous litigation and the inexpedience of putting municipal officers at hazard to defend their acts whenever any member of the community sees fit to make the assault, whether for honorable motives or not. The courts have been commensurately reluctant to usurp or supersede the discretion of municipal authorities to determine which municipal undertakings are necessary and appropriate. *Id.* at 378, 436 S.W.2d at 293-94.

The Court then delineated the general rule:

> An action by citizens and taxpayers of a municipality questioning the conduct of the municipality or its officers is ordinarily dependent upon averment of a special injury, status or relation affecting, individually, the citizen attempting to prosecute the action. Generally, the prime test of this inquiry as to special injury or interest is that it not be common to the body of citizens as a whole. In a proper case, absent such averment, it is the duty of the trial judge to dismiss the cause. *Id.* at 379, 436 S.W.2d at 294.

Although later cases have applied these principles, they are not significant in the general development of standing in Tennessee courts.

The case law appears uniform and consistent. The general rule from the early cases cited in *Patton* v. *Chattanooga, supra,* was that a taxpayer on his own behalf and that of others could maintain an action to prevent the commission of an unlawful act which would increase his tax burden or create a diversion of public funds from their lawful purpose. As *Badgett* indicates, if the wrong is a public wrong, that is, if the misuse of tax funds is asserted to be an injury to all citizens and taxpayers, the obligation is on the proper officials to challenge and to rectify the situation. The exception in this situation is that a demand must be made upon the public authorities to rectify the situation prior

to the initiation of any action by a citizen and taxpayer in light of the authorities' refusal to act, but "such demand is excused where the status and relation of the involved officials to the transaction in question is such that any demand would be a formality." *Id.* at 381, 436 S.W.2d at 295 (citations omitted).

All the cases require some special or private damage to the complainants that separates their interest in the subject matter from that of the citizenry at large. Some of the cases recognize that being a taxpayer and bearing additional liability may constitute such special damage.

Beneath the requirement of special or private damage, however, is the issue of when such special injury must be alleged. *Patton* reqires that when the acts of public officials are being challenged as ultra vires, the bill may be maintained by a taxpayer only if the injury is alleged. 108 Tenn. at 221, 65 S.W. at 420. Subsequently, *Pope* v. *Dykes, supra,* clarified the *Patton* requirement by noting that since the *Patton* injury was common to all the citizenry, the special allegation was required. 116 Tenn. at 241, 93 S.W. at 88. *Pope,* concerning the misapplication of earmarked tax funds, recognized that special injury need not be specifically averred because the imposition of additional tax burdens upon the complainant taxpayer is obviously a special injury. *Id.* at 241-42, 93 S.W. at 88.

The legislature initiates the process of amending the Tennessee Constitution by the constitutional convention route prescribed in Article XI, Section 3, of the Constitution by proposing to call a convention. This proposal is then submitted to the people for approval or rejection. If the people approve, the call of the convention is a call by the people, not by the legislature. *Illustration Design Group, Inc.* v. *McCanless,* 224 Tenn. 284, 295, 454 S.W.2d 115, 119 (1970). A call for a constitutional convention is a call by the people in general, not by any particular group of people such as "qualified voters" who

vote in the convention call referendum or voters who vote for the convention call in the referendum. Plaintiffs here obtained no greater interest in the deliberations and proposals of the convention by virtue of their having voted in the referendum than they had as citizens of the State of Tennessee in general.

The contention of plaintiffs that the limited constitutional convention engaged in a constructive fraud on the voters who participated in the referendum is without merit. The theory of constructive fraud concerns a breach of a legal or equitable duty, with or without fraudulent intent, *Maxwell* v. *Land Developers, Inc.*, 485 S.W.2d 869, 875 (Tenn. App. 1972) (citation omitted), and entails, as an attribute of fraud, conduct which reasonably can be expected to influence the conduct of others. The limited constitutional convention, under Article XI, Section 3, had only the power to propose amendments to the Constitution for later ratification or rejection by the people. It was not even in existence at the time of the voter participation in the referendum on the call. The subsequent actions of the convention could have had no influence on the conduct of the voters in the call for the referendum. Accordingly, the convention could not have engaged in constructive fraud upon the people in general since the people in general had an opportunity to approve or to reject the proposals drafted by the convention and submitted to the people.

Plaintiffs also contend that a showing of special interest is not necessary to maintain an action of extraordinary interest. They cite, in support of this contention, *Carden* v. *Bland*, 199 Tenn. 665, 288 S.W.2d 718 (1956). There a citizen and taxpayer was permitted to maintain an action challenging mandatory prayer and Bible reading in the public schools. The citizen and taxpayer filed his bill not only on behalf of himself but also on behalf of his minor children who were specially affected by the challenged practices. In holding that the suit should not have been dismissed by the trial court, the Court stated:

> While there are numerous authorities which seem to sustain the contention of both the State's Attorney General and the School Board that complainants have not shown that they have such special interest that entitles them to maintain this suit, we feel that it should not be dismissed on that ground because of the general public interest involved, and more especially the interest of pupils, most of whom are at an impressionable age, and who cannot otherwise speak for themselves. *Id.* at 671, 288 S.W.2d at 721.

The Court, in *Carden,* was concerned with the interests of the pupils in an ongoing situation. Here the plaintiffs are challenging a constitutional provision that is not self-executing, and they are not contending that they are representing the interest of persons who cannot otherwise speak for themselves.

Plaintiffs here have failed to show sufficient standing to bring this action. They have failed to allege any special interest or injury peculiar to themselves as opposed to the public in general. They do not come within any of the exceptions.

We next discuss whether plaintiffs' challenge to the legality of the amendment to Article XI, Section 12, of the Tennessee Constitution ratified on March 7, 1978, presents a justiciable controversy. That to maintain an action for a declaratory judgment a justiciable controversy must exist between persons with adverse interests is well settled. *Jared* v. *Fitzgerald,* 183 Tenn. 682, 689, 195 S.W.2d 1, 4 (1946). For a controversy to be justiciable, a real question rather than a theoretical one must be presented and a real legally protectable interest must be at stake on the part of plaintiff. *Cummings* v. *Beeler,* 189 Tenn. 151, 156, 223 S.W.2d 913, 915 (1949). If the controversy depends upon a future or contingent event or involves a theoretical or hypothetical state of facts, the controversy is not justiciable under the Tennessee Declaratory Judgments Act. *Story* v. *Walker,* 218 Tenn. 605, 607-08, 404 S.W.2d 803, 804 (1966); *United States Fidelity & Guaranty Co.* v. *Askew,* 183 Tenn. 209,

212-13, 191 S.W.2d 533, 534-35 (1946). The Declaratory Judgments Act does not give the courts jurisdiction to render advisory opinions to assist the parties or to allay their fears as to what may occur in the future.

Plaintiffs' amended complaint does not present a justiciable controversy. The amendment to Article XI, Section 12, of the Tennessee Constitution shows by its terms that it is not self-executing.

> "A constitutional provision may be said to be self-executing if it supplies a sufficient rule by means of which the right given may be enjoyed and protected, or the duty imposed may be enforced; and it is not self-executing when it merely indicates principles, without laying down rules by means of which those principles may be given the force of law." *Washington County Election Commission* v. *City of Johnson City,* 209 Tenn. 131, 137, 350 S.W.2d 601, 603 (1961) (quoting 1 Cooley's *Constitutional Limitations* 167-68 (8th ed. 1927) (footnotes omitted)).

Here legislative action is required to affect any rights of plaintiffs. Plaintiffs' present rights are not affected.

In the case at bar the controversy between the parties is theoretical and contingent upon the enacting of legislation implementing the amendment. Plaintiffs have not specified any particular legislation which would adversely affect them under the amendment. A claim based upon assumed potential invasion of rights is insufficient to establish a justiciable controversy under the Declaratory Judgments Act. *West* v. *Carr,* 212 Tenn. 367, 380-81, 370 S.W.2d 469, 475 (1963). Plaintiffs' amended complaint fails to present a justiciable controversy.

The judgment of the Chancellor is sustained. Costs are assessed to plaintiffs, and this cause is remanded to the Trial Court for the collection of costs and any other necessary orders.

/s/ Samuel L. Lewis,
Judge

Shriver, P.J., Concurs

Drowota, J., Concurs

APPENDIX B

In The Chancery Court,
For Davidson County,
Part Three,
At Nashville, Tennessee.

Norman Parks, *et al.*

vs. 79-338-III

Lamar Alexander, Governor,
State of Tennessee, *et al.*

MEMORANDUM

This is a suit for declaratory judgment seeking a ruling that the 1977 Limited Constitutional Convention acted beyond the scope of its call when it proposed a revision of Article 11, § 12 of the Tennessee Constitution. The revised article was ratified by the voters. The defendants have moved to dismiss on two grounds. First, they charge that the plaintiffs do not have standing to maintain this suit. Second, they assert that the complaint does not present a justiciable controversy under the declaratory judgment act. The defendants are correct on both grounds.

The amendment in question relates to public support for education. The old constitutional provision went into considerable detail in the matter of school financing. It contained a prohibition against white and negro children attending the same school.

Article 11, § 3 of the Tennessee Constitution provides that no change in or amendment to the Constitution proposed by a convention shall be effective unless within the limitations of the call of the convention. The statute which authorized a referendum on calling a convention provided that the scope of the convention's consideration of Article 11, § 12 was "relative to the segregation of white and negro children."

The convention proposed an article which took out almost all of the language relating to the financing of public education. It also removed the prohibition against desegregation.

The only interest in the subject matter alleged by the plaintiffs is that they are citizens, taxpayers, and voters in the referendum which called the 1977 limited Constitutional Convention. That is insufficient to give them standing to challenge the convention's actions.

More importantly, the suit does not present a justiciable controversy. The primary fear of the plaintiffs seems to be that the new constitutional provision opens the door to state assistance to private educational institutions. The fact that they allege that they have filed suit on behalf of the "Nashville Chapter of Americans United for Separation of Church and State" suggests that they are particularly concerned about state aid to private schools with church affiliation.

The constitutional amendment is not self-executing. If any part of the amendment authorizes public financing of private schools, it is the sentence which states that the Legislature "may establish and support such post-secondary educational institutions, including public institutions of higher learning, as it determines." Until the Legislature takes some action, nothing has occurred.

The declaratory judgment act does not authorize courts to render advisory opinions on theoretical questions of law. The controversy must be a genuine one existing between the parties who have adverse interests. This suit does not meet this test.

The defendant's motion to dismiss is granted. Counsel for the defendants will prepare the decree incorporating this memorandum by reference only. Costs are taxed to the plaintiffs.

/s/ Robert S. Brandt,
Chancellor

July 10, 1979

cc: Gary Crawford
Joseph H. Johnston
Everett H. Falk

IN THE CHANCERY COURT FOR DAVIDSON COUNTY, TENNESSEE

No. 79-388-III

Norman Parks, *et al.*,
Plaintiffs,

v.

Lamar Alexander, Governor, *et al.*,
Defendants.

FINAL DECREE

This cause came on to be heard in the Chancery Court for Davidson County, Part III, before the Honorable Robert S. Brandt, Chancellor, on the plaintiffs' complaint, as amended, the defendants' motion to dismiss, and the briefs and arguments of counsel, from all of which the Court is of the opinion and the Court finds, for the reasons stated in the Memorandum of the Court rendered July 10, 1979, which is incorporated herein and made a part hereof by reference, that the plaintiffs lack standing to maintain this action and the complaint does not present a justiciable controversy under the Declaratory Judgments Act. The Court further finds that the defendants' motion to dismiss is well taken and ought to be granted.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED by the Court that this cause be and the same hereby is dismissed at the cost of plaintiffs, for which execution may issue if necessary.

/s/ ROBERT S. BRANDT,
Chancellor

Approved for Entry:

/s/ GARY CRAWFORD

/s/ JOSEPH H. JOHNSTON
Attorneys for Plaintiffs

/s/ EVERETT H. FALK
Deputy Attorney General
Attorney for Defendants

APPENDIX C

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

Davidson Equity

Norman Parks and Harold Steele,
Appellants,

vs.

Lamar Alexander, Governor, State of Tennessee;
William M. Leech, Jr., Attorney General, State of Tennessee;
Gentry Crowell, Secretary of State, State of Tennessee
Appellees.

ORDER

On considering the application for permission to appeal and briefs filed in this case and the entire record the application of Norman Parks and Harold Steele is denied at cost of the appellant.

PER CURIAM

Not Participating:
Drowota, J.

APPENDIX D

IN THE CHANCERY COURT FOR DAVIDSON COUNTY, TENNESSEE

No. 79-388-III

Norman Parks and Harold Steele,
Plaintiffs,

vs.

Lamar Alexander, Governor, State of Tennessee;
William M. Leech, Jr., Attorney General, State of Tennessee;
Gentry Crowell, Secretary of State, State of Tennessee,
Defendants.

AMENDED COMPLAINT

Come now plaintiffs named hereinabove and pursuant to T.C.A. 23-1101 et seq., petition for a declaratory judgment that the Amendment to Article XI, Section 12 of the Tennessee State Constitution as ratified on March 7, 1978, is void on grounds that the amendment exceeds the limitation in the convention call by the General Assembly and would show the Court as follows:

1. Plaintiff, Norman Parks, is a citizen of the State of Tennessee, a resident of Rutherford County, a taxpayer of the State of Tennessee, and was a voter in the referendum calling the 1977 Limited Constitutional Convention.

2. Plaintiff, Harold Steele, is a citizen of the State of Tennessee, a resident of Davidson County, a taxpayer of the State of Tennessee, and was a voter in the referendum calling the 1977 Limited Constitutional Convention.

3. Defendant, Lamar Alexander, is the duly elected Governor of the State of Tennessee.

4. Defendant, William Leech, is the Attorney General for the State of Tennessee.

5. Defendant, Gentry Crowell, is the Secretary of State for the State of Tennessee.

6. Article XI, Section 12 of the Tennessee State Constitution, prior to its amendment on March 7, 1978, read as follows:

> Knowledge, learning, and virtue, being essential to the preservation of republican institutions, and the diffusion of the opportunities and advantages of education throughout the different portions of the State, being highly conducive to the promotion of this end, it shall be the duty of the General Assembly in all future periods of this Government to cherish literature and science. And the fund called common school fund, and all the lands and proceeds thereof, dividends, stocks, and other property of every description whatever, heretofore by law appropriated by the General Assembly of this State for the use of common schools, and all such as shall hereafter be appropriated, shall remain a perpetual fund, the principal of which shall never be diminished by Legislative appropriations; and the interest thereof shall be inviolably appropriated to the support and encouragement of common schools throughout the State, and for the equal benefit of all the people thereof; and no law shall be made authorizing said fund or any part thereof to be divested to any other use than the support and encouragement of common schools. The State taxes, derived hereafter from polls shall be appropriated to educational purposes, in such manner as the General Assembly shall from time to time direct by law. No school established or aided under this section shall allow white and negro children to be received

as scholars together in the same school. The above provisions shall not prevent the Legislature from carrying into effect any laws that have been passed in favor of the Colleges, Universities or Academies, or from authorizing heirs or distributees to receive and enjoy escheated property under such laws as may be passed from time to time.

7. Chapter 848 of the Public Acts of 1976 enacted on March 29, 1976 calling for the Constitutional Convention which drafted the amended Article XI, Section 12, states in pertinent part in Section I thereof:

> ...the convention to be limited to consideration of an action upon the parts and subject matter included in this act. . .
>
> * * *
>
> Article XI, Section 12 relative to the segregation of white and negro children.

This act thus limited the constitutional convention to amending Article XI, Section 12 as it related to the segregation of school children.

8. Article XI, Section 3 of the Tennessee State Constitution states in pertinent part:

> No change in or amendment to, this Constitution proposed by such convention shall become effective unless within the limitations of the call of the convention. . . .

9. The proposed Amendment to Article XI, Section 12 as drafted by the constitutional convention, states as follows:

> PROPOSAL 5: CHANGES RELATIVE TO EDUCATION
>
> That Article XI of the Constitution of Tennessee be amended by deleting therefrom in its entirety Section 12 and substituting therefor the following:

> Section 12. Inherent value of education—Public schools—Support of higher education.—The State of Tennessee recognizes the inherent value of education and encourages its support. The General Assembly shall provide for the maintenance, support and eligibility standards of a system of free public schools. The General Assembly may establish and support such post-secondary educational institutions, including public institutions of higher learning, as it determines.

Thus, the proposed amendment to Article XI, Section 12 went beyond the limited subject matter of the convention call by repealing the existing Article XI Section 12 in its entirety.

10. The proposed amendment described in paragraph 9 above was ratified by a referendum held on March 7, 1978.

11. Thus, Article XI, Section 12, as amended, is void, since, on its face, it clearly exceeds the express limitation stated in Chapter 848 of the Public Acts of 1976. See Memorandum of State Attorney General dated August 31, 1977 attached as Exhibit 1 hereto.

12. The Article XI, Petition 3 provision that amendments recommended to the people by constitutional conventions must be within the call of said conventions is a due process requirement. Plaintiffs have thus been deprived of substantive and procedural due process of law under the 14th Amendment to the U. S. Constitution and Article I, Section 8 of the Tennessee State Constitution.

13. Plaintiffs substantive due process right and cognizable property interest in the limitations of the convention call under Article XI, Section 3 and Public Chapter 848 is established by virtue of their creation through constitutional and statutory enactment.

14. Plaintiffs have a legally cognizable interest in protecting the integrity of the constitutional process in that they have been injured in a way different from members of the public generally. As voters in the referendum creating the constitutional convention, they have been deprived of the vested right to have the constitutional convention act lawfully.

15. Plaintiffs, as voters participating in the decision of whether to create the constitutional convention, voted in the referendum on the basis of a reasonable belief that the convention to be created thereby would be required to abide by Article XI, Section 3 and Public Chapter 848 limitations upon its powers. The convention created by plaintiffs and other voters in said referendum ignored said limitations, thus engaging in a constructive fraud upon the voters who participated in said election.

16. Article XI, Section 12, prior to the amendment, constituted a limitation on the state's power to appropriate funds to support non-public schools. Since the repeal of this limitation, the General Assembly has enacted legislation which would not have been constitutional prior to said repeal. Plaintiffs as taxpayers, are adversely affected by the illegal repeal of a limitation on the state's spending powers. As taxpayers, they will now be forced to contribute to the support of projects which otherwise could not be supported out of tax funds, and such additional projects constitute a drain from the tax proceeds of the state, and a further burden on plaintiffs as taxpayers.

RELIEF

WHEREFORE, PREMISES CONSIDERED, PLAINTIFFS PRAY for a declaratory judgment that Article XI, Section 12 of the Tennessee State Constitution as amended on March 7, 1978 be declared null and void by virtue of its being in excess of the limitations of the convention call in violation of Chapter 848 of the Public Acts of 1976 and Article XI, Section 3 of the Ten-

nessee State Constitution, and by virtue of said action depriving plaintiffs of their rights to substantive and procedural due process guaranteed under the 14th Amendment to the U. S. Constitution and Article I, Section 8 of the Tennessee State Constitution.

Respectfully submitted,

/s/ JOSEPH H. JOHNSTON
Suite 205, 112 21st Avenue, So.
Nashville, Tennessee 37203 327-3334

/s/ GARY E. CRAWFORD
26th Floor, L & C Tower
Nashville, Tennessee 37219 244-9270
Attorneys for Plaintiffs

SURETY

I am surety for costs in this cause not to exceed $500.

/s/ Joseph H. Johnston

APPENDIX E

EXHIBIT 1

STATE OF TENNESSEE

Office of the Attorney General
450 James Robertson Parkway
Nashville, Tennessee 37219

August 31, 1977

The Honorable Richard J. Eskind, Delegate
Constitutional Convention
Ground Floor - Life and Casualty Tower
Nashville, Tennessee 37219

Dear Mr. Eskind:

You have requested an opinion of this office with respect to several questions concerning the authority of the 1977 Limited Constitutional Convention to propose amendments to the Tennessee Constitution. You have also inquired as to the manner of submission of proposed amendments to the people for ratification or rejection. Before responding to your inquiries, we deem it advisable to examine the historical context of amending the Constitution by the constitutional convention method.

The constitutional amendatory process by the constitutional convention method is prescribed in the second paragraph of Article XI, Section 3, of the Tennessee Constitution. This part of the Constitution provides as follows:

> "The Legislature shall have the right by law to submit to the people, at any general election, the question of calling a convention to alter, reform, or abolish this Constitution, or to alter, reform, or abolish any specified part or parts of

> it; and when, upon such submission, a majority of all the voters voting upon the proposal submitted shall approve the proposal to call a convention, the delegates to such convention shall be chosen at the next general election and the convention shall assemble for the consideration of such proposals as shall have received a favorable vote in said election, in such mode and manner as shall be prescribed. No change in, or amendment to, this Constitution proposed by such convention shall become effective, unless within the limitations of the call of the convention, and unless approved and ratified by a majority of the qualified voters voting separately on such change or amendment at an election to be held in such manner and on such date as may be fixed by the convention. No such convention shall be held oftener than once in six years."

Prior to 1953, the convention method of Article XI, Section 3, made no mention of authorizing the Legislature to draft a call of a limited constitutional convention; rather, Article XI, Section 3, only spoke in terms of authorizing the Legislature to submit to the people the question of calling a convention to alter, reform or abolish this Constitution. This led the Attorney General in 1946 to render an opinion that under the existing provisions of Article XI, Section 3, a convention call could not limit the amendatory powers of the convention with respect to the Constitution as a whole.

In 1949, however, the Legislature, by Chapter 49 of the Public Acts of 1949, proposed to call a limited constitutional convention to alter, reform or abolish only certain specified parts and subject matter of the Constitution. Under Chapter 49, the Secretary of State was required to spend money to hold a special election to submit the limited call to the people. Because the 1946 opinion of the Attorney General cast doubt on the constitutionality of this limited call, the Secretary of State sought a declaratory judgment to declare the constitutional validity of

Chapter 49. In resolving this question, the Tennessee Supreme Court in *Cummings* v. *Beeler,* 189 Tenn. 151, 223 S.W.2d 913 (1949), declared Chapter 49 constitutionally valid, holding that under the general language of Article XI, Section 3, the people could limit the amendatory power of a constitutional convention by approving a limited call proposed by the Legislature. In this respect, the Court said:

> "It is not the legislature who limit the scope of a convention but it is the people themselves who by their vote under the terms of this act limit the scope of the convention. The Constitutional provision above quoted does not prohibit the revision or amendment of a part of the Constitution by the convention method. The purpose of the Act here is to revise or amend the Constitution in the particulars indicated provided the convention called concludes that it is necessary to amend and then if they so conclude the people have another right to vote as to whether or not these amendments, as set forth in a convention called, shall be a part of our Constitution. The thing that the people call a convention for is not to revise or to write a new Constitution but only a part thereof. *The people having thus voted to circumscribe the limits of their elected convention delegates, in the particulars as provided for in the Act, bind these delegates within these limits.*" (Emphasis supplied)
>
> 189 Tenn. at 176

In 1951, a limited constitutional convention call was proposed by Chapter 130 of the Public Acts of 1951. One of the parts designated in this call was Article XI, Section 3, relating to amendments and conventions, and in 1953 the present amendment of Article XI, Section 3, was adopted by the convention and approved by the people. The 1953 amendment specifically permitted the calling of limited constitutional conventions and removed any doubt (if such existed after the *Cummings* deci-

sion) that the limitations contained in the call of a convention were binding on that convention by providing that proposed amendments which were not within the limitations of the call would not become effective.

The limitations contained in the 1951 call and in the 1962 call (Ch. 2, Pub. Acts 1962) took the form of a designation of the sections of the Constitution to be considered for alteration, reformation or abolition and a simple description of the subject matter of the sections. In 1968, however, the Legislature proposed a limited call to consider, among other things, the taxing section of the Constitution embodied in Article II, Section 28. This call (Ch. 421, Pub. Acts 1968, as amended) departed from the format of prior calls and undertook to define the limits of the convention to such a degree as to effectively prescribe the substance of the amendment to this section. Because of this legislative attempt to write the amendment itself by casting affirmative proposals as limitations, the 1968 call and the amendment which was approved in 1972 spawned several lawsuits, culminating with the decision in *Snow* v. *City of Memphis,* 527 S.W.2d 55 (Tenn. 1975). The *Snow* case held that when the constitutional convention method is used in amending the Constitution, the Legislature in initiating that method by proposing a limited call cannot impose limitations on a convention beyond a designation of the part or parts of the Constitution to be altered, reformed or abolished and the subjects to be considered. The Court in *Snow* said:

> "Accordingly, we hold that any restrictions in the call, exceeding a recitation of the subject matter of the existing section designated for consideration, are not binding upon the Convention, and the Convention is free to abolish, or to alter or amend the section to such extent and in such manner as it deems proper. If the Legislature, as the agent of the people, desires to submit to the people the question of calling a Constitutional Convention to consider new subject matter, not embraced in the Constitution, it, of

> course, may do so by an appropriate description of such subject matter, corresponding to the descriptive format used to describe the subject matter of existing Constitutional sections in the 1949, 1951, and 1962 calls. To the extent that the Legislature includes affirmative proposals in the call, beyond the scope aforesaid, the excess is mere surplusage in the nature of gratuitous advice, and even though approved by the people, is not binding on the Convention, nor does it invalidate the call or the subsequent action of the Convention.
>
> 527 S.W.2d at 63

It is seen that the *Snow* decision does *not* stand for the proposition that all limitations in a call are mere surplusage. Rather the Court in *Snow* clearly stated that the limitations in the call to the extent that they specify a part or parts of the Constitution or designate subject matter are in fact binding on the Convention. The Court viewed the call as a grant of authority from the people to the convention to consider revision to the Constitution, and to the extent that parts or subjects were not contained in the call, the people had given no permission to the convention to consider constitutional revision.

In addressing the questions posed by your letter, we would first recognize that where the call as embodied in Chapter 848 of the Public Acts of 1976 specifies particular parts of the Constitution to be considered for alteration, reformation, or abolition, those parts and only those parts are open for consideration. The subject matter designations following the specifications of the parts of the Constitution further define the limits on the convention by reciting the subjects within the parts which are open for consideration and the extent to which new subject matter can be written into revisions of the specified parts. Thus, where the subject matter designations serve to define certain subjects within a specified part, the convention would be authorized to consider only those provisions in the specified part germane to

the designated subjects. Where, however, the subject matter designations following the specified parts of the Constitution to be considered by the convention simply correspond to the captions of those parts, the convention would be authorized to consider all of the provisions of the part for alteration, reformation or abolition as being germane to the designated subject matter. In no event could the convention write new, unrelated and nongermane subject matter into a particular part except to the extent allowed by the subject matter designations in the call. Otherwise, if the convention could write new, unrelated and nongermane subject matter into a revision of a given part of the Constitution, the convention would be essentially an unlimited convention and the limitations imposed by the people in their grant of authority to the convention would be emasculated.

With these principles in mind, we will examine each of the parts of the Constitution about which you have inquired.

1. *Article II, Section 18:* — This section deals with the passage of bills and the caption simply states "passage of bills." In the call, this part is designated as "Article II, Section 18, relative to the passage of bills, with particular reference to the requirement that bills be signed by the respective speakers in open session." We are of the opinion that all of the provisions of Article II, Section 18, are open for consideration because the subject matter designation corresponds to the caption of the section. The wording of the remainder of the language referencing the provision that bills be signed by the respective speakers in open session is such that it does not appear to constitute a restriction on the convention but rather constitutes an expression that the convention should give particular attention to that provision.

2. *Article II, Section 24:* — This section pertains to appropriations of public money in the Treasury of the State of Tennessee. In the call, this part is designated as follows:

> "In Article II, Section 24, relative to devising a method by which the State of Tennessee reaches a position of making

annual appropriations from funds in hand as opposed to appropriations against estimated revenues, with any ceiling provided on appropriations being expressed in some terms other than dollar amounts; . . ."

We are of the opinion that this entire section is open for consideration. The subject matter designated in the call corresponds generally to the subject matter contained in the provisions of this section and would not operate to restrict the consideration of the provisions of this section. The description of the subject matter in the call would operate, however, to restrict the convention to the consideration of the general subject of public money in the Treasury of the State, and would not permit the convention to deal with the new subject of public monies of local political subdivisions in drafting a revision to this section.

3. *Article III, Section 18, the second and fourth paragraphs:* — These paragraphs pertain to action by the Governor on bills, including the subjects of the time in which the Governor must act on legislation and the Governor's line item veto power in appropriations bills. The call specifies that the subject matter of these paragraphs to be considered by the convention is relative to the time in which the Governor must act on legislation. Thus, we are of the opinion that the convention is restricted to this particular subject matter in considering amendments to these paragraphs.

4. *Article IV, Section 1:* — This section deals with the right to vote (including age, citizenship and residency qualifications), election precincts, and military duty. The call designates "Article IV, Section 1, relative to the voting age." Accordingly, we are of the opinion that only the provisions of Article IV, Section 1, germane to the voting age are open for consideration.

5. *Article XI, Section 11:* — This section concerns the homestead exemption and includes provisions pertaining to the exemption of a homestead from sale under legal process, the

alienation of a homestead without the joint consent of husband and wife, and the non-applicability of the homestead exemption as against public taxes and purchase money debts. In the call the subject of the homestead exemption from sale under legal process is specified. We are of the opinion, however, that all of the provisions of this section are germane to the general subject of the homestead exemption from sale under legal process and that, therefore, this entire section is open for consideration by the convention.

6. *Article XI, Section 12:* — This section deals with education. It imposes a duty upon the General Assembly to cherish literature and science, provides for a common school fund, specifies the appropriation of poll taxes to educational purposes, and requires the segregation of white and Negro children in schools. The call provides for the consideration of "Article XI, Section 12, relative to the segregation of white and Negro children." Accordingly, we are of the opinion that only this subject may be considered by the convention in amending Article XI, Section 12.

You have next inquired as to the manner of submitting proposed amendments to the people for ratification or rejection. Specifically, you have asked several questions, and we will treat these questions in the order in which you have asked them.

(A) You have first inquired if there is a limitation on the number of amendments that the convention may submit to the voters for ratification or rejection. Your inquiry in this respect appears to concern whether or not the convention may submit several alternative proposals to the people with respect to amending a given part of the Constitution.

We are of the opinion that there is no numerical limitation on the number of amendments which can be proposed by the convention, but the convention can propose only one amendment with respect to each separate subject dealt with by the convention. The convention could not propose several alternative

amendments, leaving the ultimate selection of the amendment to the people in the ratification process. We reach this conclusion based on the ground that the people have a right to retain existing constitutional provisions by rejecting a proposed amendment thereto. Were the ultimate amendment selected from among alternative proposals by vote of the people in the ratification election, there would be no mechanism whereby the people could retain the existing constitutional provision unless that provision were also included on the ballot. This, in turn, would require in effect a "reratification" of an existing constitutional provision in order for it to remain in the Constitution, a result which is not contemplated by Article XI, Section 3.

(B) You have next inquired as to what is meant by the language in Section 9 of the call that "each amendment to the Constitution adopted by the convention should be separately submitted to the voters of the State for ratification or rejection of each separate amendment."

We are of the opinion that the basic test for separate submission of amendments is what part of the Constitution is affected by the proposed amendment. If the reformation, alteration or abolition pertains to an article of the Constitution as a whole, then the proposed new article should be submitted for approval or rejection as a whole even though the new article may contain several sections or paragraphs. On the other hand, if the reformation, alteration of abolition concerns a specific part, section or sections of an article, then each amended or abolished part or section should be submitted separately to the people for approval or rejection. This approach reduces the difficulty in segregating the several and various matters for separate submission and mitigates the problem of severability should one or more of the several proposals be rejected by the people.

We find support in this position by noting that the 1973 amendment to Article II, Section 28, was submitted to the people for

approval in its entirety. This particular amendment constituted a complete revision of Article II, Section 28, and embraced several subject matters in the area of taxation. It is also noted that the constitutional conventions of 1834 and 1870 submitted the respective entire constitutions as adopted by them to a vote of the people (although they were not required to do so). See TCA Vol. 1 at 708, n. 9.

(C) You have also asked whether, within the requirement that the convention set forth the manner and date for an election for ratification or rejection of any amendments, the convention is bound by the requirement that such date be after the final adjournment of the convention as stated in Section 9 of the call. Furthermore, you have inquired as to whether the General Assembly has the authority to call such an election for ratification or rejection of any amendments if by chance the convention itself does not call said election.

We are of the opinion that the convention is bound by the requirement in Section 9 of the call that the convention fix the date for the election on ratification or rejection of proposed amendments at a date after the final adjournment of the convention. Article XI, Section 3, speaks in terms of submitting changes or amendments to the voters "at *an* election to be in such manner and on such date as may be fixed by the convention." (Emphasis supplied.) This language contemplates that a single election is to be held for ratification or rejection of proposed amendments by the voters. It follows that this election should be held after the convention has finally adjourned when its amendatory functions have ceased. Otherwise, the convention could meet continuously and submit proposed amendments to the people on a continuing basis. We do not think that Article XI, Section 3, contemplates this.

We are also of the opinion that the convention has a duty, both under terms of the call and under the provisions of Article XI, Section 3, to call the election on its proposed amendments.

Should the convention finally adjourn without performing this duty for any reason, we are of the opinion that the General Assembly may call an election for this purpose in accordance with the provisions of the call. The people, having approved the call, would have a right to vote on the amendments proposed by the convention. As the Court noted in *Snow* v. *City of Memphis,* 527 S.W.2d 55 (Tenn. 1975), the final validating step by the people is the most significant step in the amendatory process, and we think that the convention could not defeat this step by failing to call the election.

Very truly yours,

/s/ Everett H. Falk
Deputy Attorney General

/s/ BROOKS McLEMORE
Attorney General

APPENDIX F

Public Acts, 1976

Chapter No. 848

House Bill No. 290

By Ashford, Murray (Franklin), Moore

Substituted for: Senate Bill No. 388

By Ashe

AN ACT to submit to the people of Tennessee the question of calling of a convention for the purpose of altering, reforming, or abolishing the present Constitution of Tennessee with respect to certain parts and subject matter; to provide for an election to determine the will of the people with respect to such question; to provide for the holding of a convention if the people approve the proposal and call a convention; to provide for the election of convention delegates; and the filling of vacancies; to fix their compensation and allowances; to provide for an election to submit the recommendations of the convention to the people for their approval; to provide for the payment of the expenses of holding the elections and the convention; and to provide for the fiscal supervision of the convention.

WHEREAS, Article XI, Section 3, of the Constitution of Tennessee provides:

"The Legislature shall have the right by law to submit to the people, at any general election, the question of calling a convention to alter, reform, or abolish this Constitution, or to alter, reform, or abolish any specified part or part of it; and when, upon such submission, a majority of all the voters voting upon the proposal to call a convention, the delegates to such convention shall be chosen at the next general election and the convention shall assemble for the consideration of such proposals as shall have received a favorable vote in said election, in such mode and manner as shall be prescribed."; and

WHEREAS, the legislature considers it to be in the public interest to submit to the people of Tennesse the question of whether or not the present Constitution of Tennessee should be altered, reformed, or abolished only in certain particular parts, sections, or additions, as may be determined by a convention whose authority would be limited by vote of the people to the consideration of altering, reforming, or abolishing only those parts or sections of the Constitution to which the suggested reforms would, if adopted, apply, including any additional provisions relating to such matters which might be required; and whose actions in such matters shall be subject to ratification by the people, in whole or in part, the legislature acting merely as the designated agency to enable the people of Tennessee to determine the question of whether or not such a limited convention should be held, now, therefore,

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF TENNESSEE:

SECTION 1. In order to ascertain the will of the people with respect to whether or not a limited constitutional convention should be called, there shall be submitted to the people of the state at the general election to be held on Thursday, August 5, 1976, the following question, which shall be printed in full on each ballot or voting machine, in words and figures as follows:

CONSTITUTIONAL REFERENDUM

Shall a convention be held to alter, reform or abolish the following parts and subject matter of the present Constitution of Tennessee, the convention to be limited to consideration of and action upon the parts and subject matter included in this act and whose actions with respect thereto to become effective only after each amendment proposed by the convention is separately submitted to and ratified by a vote of the people:

In Article II, Section 8 relative to legislative sessions and the inauguration of the governor; Article II, Section 15 relative to

the filling of vacancies in the legislature; Article II, Section 18, relative to the passage of bills, with particular reference to the requirement that bills be signed by the respective speakers in open session; in Article II, Section 24, relative to devising a method by which the state of Tennessee reaches a position of making annual appropriations from funds in hand as opposed to appropriations against estimated revenues, with any ceiling provided on appropriations being expressed in some terms other than dollar amounts; in Article III, Section 4, relative to the governor's term of service; Article III, Section 18, the second and fourth paragraphs relative to the time in which the governor must act on legislation; in Article IV, Section I relative to the voting age; All of Article VI, consisting of Sections 1 through 15, all relating to the judicial department; in Article VII, Sections 1 and 2 relative to county officers, their election, terms and removal and the filling of vacancies; Article XI, Section 7 relative to interest rates; Article XI, Section 11 relative to a homestead exemption from sale under legal process; Article XI, Section 12 relative to the segreation of white and negro school children; Article XI, Section 14 relative to the intermarriage of whites and negroes.

FOR THE CONVENTION ☐

AGAINST THE CONVENTION ☐

Voters will indicate their choice by placing a cross mark (x) opposite one or the other of the above expressions.

If the number of votes cast for the convention shall be greater than the number of votes cast against the convention, such convention, whose authority and actions shall be limited as above provided, shall be assembled and held and delegates thereto shall be elected as provided in this act.

SECTION 2. The proper officers in all counties shall immediatley after the election make a return to the Secretary of State of the number of votes cast in their respective counties

"For the Convention" and the number of votes case "Against the Convention" with respect to the question included in Section 1 and after comparison of the returns by the Secretary of State and the Attorney General, the Governor shall, by proclamation, announce the results.

SECTION 3. If the people approve the question and thereby authorize the convention, delegates shall be elected at the general election which shall be held on Tuesday, November 2, 1976, under the general election laws of the state in the several counties and representative districts. There shall be ninety-nine (99) delegates, with one to be elected by the qualified voters of each representative district from which members are elected to the House of Representatives of the Tennessee General Assembly, as such districts exist at the time delegates are elected to the Constitutional Convention. Delegates shall be subject to the campaign financial disclosure law, Tennessee Code Annotated, Section 2-1001, et seq.

SECTION 4. Any citizen of the state who can qualify for membership in the House of Representatives of the General Assembly may become a candidate for delegate to the convention upon filing with the County Election Commission of his county a nominating petition containing not less than twenty-five (25) names of legally qualified voters of his or her representative district. Each district must be represented by a qualified voter of that district. In the case of a candidate from a representative district comprising more than one county, only one qualifying petition need be filed by the candidate, and that in his home county, with a certified copy thereof filed with the Election Commission of the other counties of his representative district.

Every person desiring to become a delegate to the convention shall qualify by the filing of qualifying petition or petitions by 12:00 o'clock noon, prevailing time, on Wednesday, September 15, 1976. The names of candidates for the delegates to the con-

vention shall be placed on the official ballot in the same manner as candidates for the General Assembly.

The returns from the various counties of the state electing delegates to the convention shall be certified to the Secretary of State and canvassed by him and the Governor and the Attorney-General in the same manner and form as the returns are required to be certified from the election in which the people vote for and against the calling of the convention, as provided in Section 1, and the Governor shall by proclamation announce the names of those elected as delegates to the convention. Delegates to the convention elected and certified shall receive a certificate of election signed by the Governor and attested by the Secretary of State under the Great Seal of the state.

SECTION 5. Any and every person acting as a lobbyist at the Constitutional Convention shall comply with Tennessee Code Annotated, Sections 3-601-610, as if the convention were the General Assembly of the State of Tennessee.

SECTION 6. The delegates elected to the convention shall assemble in the chamber of the House of Representatives at Nashville at 12 o'clock noon on Monday, August 1, 1977, and organize by electing one of their members as president, another as secretary, and by electing such other officers as they consider necessary. If a majority of the delegates shall not be present on that date, those present shall adjourn from day to day until a majority appears, when the convention shall be organized. The convention when organized may adopt its own rules of procedure. The Comptroller of the Treasury shall provide staff services and assistance for the convention. The Comptroller of the Treasury and the Commissioner of Finance and Administration shall jointly develop a budget for the convention and supervise the spending of funds appropriated to the convention. The budget shall include any additional staff positions that may be necessary to establish for the convention and the salaries and benefits for such positions. The president of the convention

shall be the chief fiscal officer of the convention. The convention shall not be authorized to hire or contract with public relations personnel or consultants nor purchase space or time for promotional or publicity purposes in newspapers, magazines, or on radio or television, but may, with the approval of the Comptroller and Commission of Finance and Administration, have printed any necessary reports, pamphlets, booklets, or similar publications explanatory of the work and recommendations of the convention.

The compensation of the delegates to the convention shall be a per diem allowance in such amount as may prevail during the time the convention meets for members of the General Assembly and they shall also be allowed the same mileage allowance as may be provided to members of the General Assembly during the time the convention meets, which allowances shall be paid by the state in the same manner that members of the General Assembly are paid, upon certification by the president and secretary of the convention. Compensation and expenses of delegates and such other incidental expenses as may be necessarily incurred by the convention shall be paid by the Commissioner of Finance and Administration on warrant drawn upon the Treasurer, upon certification of the president and secretary of the convention.

In case there should be a vacancy in the membership of the convention from any representative district, it shall be filled by election of another qualified delegate by the legislative body of the county of residence of the delegate whose seat becomes vacant.

SECTION 7. It is the duty of the Secretary of State to make publication in at least one newspaper of general circulation in each county of the fact that a constitutional convention election is to be held in the state on Thursday, August 5, 1976. Any county not having a general circulation newspaper published in

that county shall be considered to have been notified by publication in the newspapers published in counties immediately adjacent thereto. The Secretary of State shall also certify to the various commissioners of the different counties the form for the ballot with reference to the constitutional convention election agreeable to the terms of this act and furnish the election commissioners with any other necessary printed information pertaining to the election that he may consider material or necessary.

If the people vote in favor of the convention, then it is the duty of the Secretary of State to issue a call for the election of delegates to the convention. The election shall be held in the various counties of the state on Tuesday, November 2, 1976, and the Secretary of State shall certify to the various county election commissioners the form of the ballot to be used in the election of delegates.

All ballots used in the August 1976 general election shall include the above question as to holding the limited constitutional convention and the ballots used in the November 1976 election shall include the names of the candidates for delegates to such convention.

SECTION 8. The final action of the convention with respect to the alteration, reformation, abolishment or amendment of the sections and the subject matter of the Constitution of Tennessee as set out in this act shall be duly certified by the president and secretary of the convention and the original certified copy shall be transmitted to the Secretary of State for preservation among the official records of the state. The convention shall have no authority to meet beyond July 31, 1978.

SECTION 9. Each amendment to the Constitution adopted by the convention shall be separately submitted to the voters of the state for ratificaion or rejection of each separate amendment at an election to be held in such manner and on such date after

the final adjournment of the convention as may be fixed and determined by the convention. If, for any reason, then the General Assembly at the legislative session next convening following the convention shall call an election for that purpose, fixing the date for the election and the form of the ballot that shall be used. The official ballot to be used in any such election shall be arranged so that the voter can vote separately for the ratification or rejection of each and every amendment. Any election so held shall be held under the general election laws of the state.

When the election to ratify or reject any amendment or amendments to the Constitution has been held, the various county election commissioners shall certify the result thereof in each county to the Secretary of State, who, together with the Governor and Attorney General, shall canvass the returns and the Governor shall issue a proclamation showing the result of the election on the ratification or rejection of the amendments. All amendments ratified and approved in the election held for that purpose shall be proclaimed by the Governor as a part of the Constitution of the state and his proclamation shall be filed in the office of the Secretary of State.

SECTION 10. All expenses in connection with the holding of any of the elections authorized by this act shall be paid by the Commissioner of Finance and Administration on warrant drawn upon the Treasurer upon certification of the Secretary of State to the correctness of each account. No compensation shall be paid by the state to the various county election commissioners for their services or for rental space or quarters in the various counties for places for holding any election herein authorized.

SECTION 11. If any provision of this act or the application thereof to any person or circumstance is held invalid, such invalidity shall not affect other provisions or applications of the

act which can be given without the invalid provision or application, and to that end the provisions of this act are declared to be severable.

SECTION 12. This act shall take effect upon becoming a law, the public welfare requiring it.

PASSED: March 19, 1976

Ned R. McWherter,
SPEAKER OF THE HOUSE OF REPRESENTATIVES

John S. Wilder,
SPEAKER OF THE SENATE

APPROVED:

Public Chapter No. 848, which is House Bill No. 290 of the 1976 Public Acts, was enacted pursuant to Article II, Section 3 of the Constitution and does not require the approval of the Governor. Therefore, this bill became effective March 19, 1976.

GOVERNOR